



October 1, 2001

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2001-4389

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152562.

The Texas Department of Transportation (the "department") received a request for information regarding the repair and installation history of a traffic light at a certain intersection. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you raise and have reviewed the information you submitted.

We first note that the submitted documents include peace officer's accident reports that appear to have been prepared pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Access to these accident reports is governed by law outside chapter 552 of the Government Code.¹ The Seventy-fourth Legislature amended section 47 of article 6701d, Vernon's Texas Civil Statutes, to provide for the release of an accident report to a person who provides two of the following three items of information: (1) the date of the accident, (2) the name of any person involved in the accident, and (3) the specific location of the accident. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413, 4414. In other legislation, the Seventy-fourth

¹The Seventy-seventh Legislature amended section 550.065(c)(4) of the Transportation Code to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 5 (to be codified at Transp. Code § 550.065(c)(4)). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* However, the amendment of section 550.065 is applicable only to a request for an accident report made on or after September 1, 2001, the effective date of House Bill 1544. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 10(c).

Legislature repealed and codified article 6701d as section 550.065 of the Transportation Code without substantive change. *See* Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 24, 25, 1995 Tex. Gen. Laws 1025, 1870-71.² In section 13 of Senate Bill No. 1069, the Seventy-fifth Legislature amended section 550.065 of the Transportation Code to provide for release of accident reports under specific circumstances. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 13, 1997 Tex. Gen. Laws 4575, 4582-83 (current version at Transp. Code § 550.065). That same legislation also repealed section 47 of article 6701d, V.T.C.S. *See id.* § 16(b), 1997 Tex. Gen. Laws 4575, 4583. However, a Travis County district court has issued a permanent injunction precluding the enforcement of the amendment of section 550.065 of the Transportation Code that was enacted by section 13 of Senate Bill No. 1069. *See Texas Daily Newspaper Ass'n v. Cornyn*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., April 26, 2000). The district court has determined that the law in effect prior to the passage of Senate Bill No. 1069 now governs and remains unaffected by the permanent injunction. We have determined that the law in effect prior to the passage of Senate Bill No. 1069 was section 47 of article 6701d, V.T.C.S.³

Subsection (a) of section 47 provides that “[e]xcept as provided by Subsection (b) of this section, all accident reports . . . [are] privileged and for the confidential use of the Department [of Public Safety] and agencies . . . having use for the records for accident prevention purposes.” V.T.C.S. art. 6701d, § 47(a). Subsection (b) of section 47 provides in relevant part:

- (1) The Department or a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report on request to:

...

²Because the repeal of a statute by a code does not affect an amendment of that statute by the same legislature that enacted the code, the amendment of section 47 of article 6701d, V.T.C.S., is preserved and given effect as part of the code provision. *See* Gov’t Code § 311.031(c).

³In 1997, the Seventy-fifth Legislature enacted Senate Bill No. 898, amending section 550.065 of the Transportation Code to conform to section 47 of article 6701d, as amended by the Seventy-fourth Legislature, and repealing article 6701d. *See* Act of May 8, 1997, 75th Leg., R.S., ch. 165, § 30.125, 1997 Tex. Gen. Laws 327, 648-49. Although the Seventy-fifth Legislature enacted Senate Bill No. 898 prior to the passage of Senate Bill No. 1069, Senate Bill No. 898 was not made effective until September 1, 1997. *See id.*, § 33.01, 1997 Tex. Gen. Laws 327, 712. Further, Senate Bill No. 1069 expressly provides that to the extent of any conflict, Senate Bill No. 1069 prevails over another act of the Seventy-fifth Legislature. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1187, § 16(c), 1997 Tex. Gen. Laws 4575, 4583. If irreconcilable amendments are enacted by the same session of the same legislature, the latest in time prevails. *See* Gov’t Code § 311.025(b). Thus, because Senate Bill No. 898 never became effective, and later amendments prevail, we conclude that section 47 of article 6701d, V.T.C.S., was the law in effect prior to the passage of Senate Bill No. 1069 regarding the availability of accident report information, rather than section 550.065 of the Transportation Code as amended by Senate Bill No. 898.

(D) a person who provides the Department or the law enforcement agency with two or more of the following:

- (i) the date of the accident;
- (ii) the name of any person involved in the accident; or
- (iii) the specific location of the accident[.]

V.T.C.S. art. 6701d, § 47(b)(1)(D); *see* Act of May 27, 1995, 74th Leg., R.S., ch. 894, § 1, 1995 Tex. Gen. Laws 4413.⁴ Under section 47(b)(1)(D), a law enforcement agency employing a peace officer who made an accident report is required to release a copy of the report to a person who provides the law enforcement agency with at least two of the three specified items of information. In this instance, the department is not the law enforcement agency that employed the peace officers who prepared the accident reports in question. Therefore, the department must withhold these accident reports under section 47(a) of article 6701d, V.T.C.S.

The submitted documents also include information that comes within the scope of section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1) (emphasis added). Information that is subject to section 552.022(a)(1) must be released, unless it is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, this exception is not other law that makes information confidential for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body). We have marked the information that the department must release under section 552.022(a)(1).

⁴The text of amended section 47 of article 6701d, V.T.C.S., is not found either in the Vernon's Revised Civil Statutes or in the Transportation Code. It is published, however, in the 1995 General and Special Laws of the Seventy-fourth Legislature at chapter 894, section 1.

You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 bears the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. The governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date that the governmental body received the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. -- Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. -- Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both parts of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has held that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If that representation is not made, the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You inform this office that the requestor attached a notice of claim to his request for the information at issue. You represent to this office that the notice meets the requirements of the Texas Tort Claims Act. Based on this representation, we find that the department has

demonstrated that litigation was reasonably anticipated on the date of its receipt of this request for information. We also find that the information at issue relates to the anticipated litigation. We therefore conclude that the department may withhold this information at this time under section 552.103.

In reaching this conclusion, we assume that the opposing party to the anticipated litigation has not seen or had access to any of the information that the department seeks to withhold under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to anticipated litigation has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes or no longer is reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must withhold the accident reports under section 47(a) of article 6701d, V.T.C.S. The department must release the information that is subject to section 552.022(a)(1) of the Government Code. The department may withhold the remaining requested information at this time under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

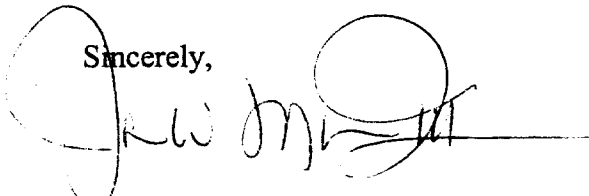
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dept. of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'JW Morris III', with a horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 152562

Enc: Submitted documents

c: Mr. Lawrence F. Labanowski
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(w/o enclosures)